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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

TIMBISHA SHOSHONE TRIBE, JOSEPH KENNEDY, ANGELA BOLAND, GRACE GOAD, ERICK MASON and HILLARY FRANK, MADELINE ESTEVES and PAULINE ESTEVES,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, DONALD LAVERDURE, Acting Assistant Secretary of the Interior for Indian Affairs, AMY DUTSCHKE, Pacific Regional Office Director of the Bureau of Indian Affairs, TROY BURDICK, Central California Agency Superintendent of the Bureau of Indian Affairs, MARGARET CORTEZ, purported Tribal Council Secretary/Treasurer, BILL EDDY, purported Tribal Vice Chair, EARL FRANK, purported Tribal Council Member, GEORGE GHOLSON, purported Tribal Chairman, and CLYDE NICHOLS, purported Tribal Council Member,

Defendants.

Case No. 2:11-cv-00995-MCD-DAD

SPECIALLY APPEARING TRIBAL DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS SECOND AMENDED COMPLAINT, OR, IN THE ALTERNATIVE, MOTION FOR MORE DEFINITE STATEMENT

Date: September 20, 2012
Time: 2:00 p.m.
Ctrm: 7 (14TH floor)
Hon. Morrison C. England, Jr.

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I. INTRODUCTION

Plaintiffs' Second Amended Complaint ("SAC") is an effort to end-run the Court's earlier ruling dismissing this lawsuit and to force the Court to consider – yet again – whether to interfere with the politics and sovereign immunity of an Indian tribe. The Court in dismissing the First Amended Complaint ("FAC") already held that the Timbisha Shoshone Tribe and its 2011 Elected Counsel are *both* protected from suit by sovereign immunity *and* indispensable to this lawsuit. Dkt. No. 58 (Court's Order dismissing FAC). These two factors remain determinative in the SAC, and considered together, the conclusion is undeniable: this lawsuit must be dismissed under Rule 12(b)(1) and Rule 12(b)(7).[1]

Specially-Appearing Defendants the Timbisha Shoshone Tribe (the "Tribe"), and Margaret Cortez, Bill Eddy, Earl Frank, George Gholson, and Clyde Nichols, appearing in their official capacities only (the "2011 Elected Council," and collectively with the Tribe, "Tribal Defendants") hereby move to dismiss this lawsuit with prejudice on the grounds that the Tribe, as a federally recognized Indian tribe, and its current council, as government officials thereof, have sovereign immunity from this lawsuit. As the 2011 Elected Council and Tribe cannot be joined, and are indispensable parties, no amendments can cure the SAC's defects. The Court lacks subject matter jurisdiction over this case and Plaintiffs fail to state any cognizable claim under federal law.

The only differences between the SAC and FAC are Plaintiffs' contrived modifications designed to avoid the Court's prior ruling. Plaintiffs are a faction of the Tribe (the Kennedy Faction) that failed to win council seats in the last Tribal election and are now fighting by whatever means possible to overthrow the existing 2011 Elected Council. Just as before, the present complaint centers on tribal politics and disputes that are beyond the reach of the courts. The relief requested now – a declaration that the Department of Interior's ("DOI") decision to

[1] All references to a "Rule" or "Rules" refer to the Federal Rules of Civil Procedure unless otherwise noted.

recognize the Tribal Council was unlawful and a remand of this decision for reconsideration – if granted, would dramatically impact Tribal sovereignty and jeopardize the Tribe's ability to operate as a government. *See* SAC Prayer for Relief, ¶1-2. A ruling in Plaintiff's favor would cause political instability, stymie government-to-government relations, interfere with finances, disrupt day-to-day operations, and gridlock the ability of the Tribe to effectively govern and sign contracts. Declaration of George Gholson ("Gholson Decl.") attached as Exh. A, ¶¶ 19-26; Declaration of Ellie Jackson ("Jackson Decl.") attached as Exh. B, ¶¶ 3, 5, 7.

Plaintiffs' current attempt to join the Tribal Defendants is a placating gesture in response to the Court's prior dismissal of the case. Plaintiffs evasively argue the 2011 Elected Council members, while named as defendants, have no authority as government officials and are not necessary parties because no relief is sought against the Council members. SAC ¶¶ 23-32; Prayer for Relief, ¶¶ 1-4 (relief purportedly sought only against DOI). In other words, the joining of the 2011 Elected Council is a sham, serves no legal purpose, and was only included as an attempt to backhandedly satisfy the order of the Court.

Likewise, the naming of the Tribe is contrived to avoid the Court's prior ruling. The Tribe is ambiguously joined in "the alternative" under Rule 19. *See* SAC ¶37 (Tribe joined because Court dismissed action based on Tribe's absence in FAC). But Plaintiffs' once again attempt to add the Tribe as a *plaintiff* and without the legal authority to do so. The Court already ruled that Plaintiffs have no authority to represent the Tribe as a plaintiff. Dkt. No. 28 at 10-11 (Court Order denying request for preliminary injunction). This gamesmanship should end. The Tribe is now specially appearing – with full legal authority – and requests to be treated as a Defendant and for the Court to dismiss this case.

Not surprisingly, the SAC and service of summons are also confusing as to who is being sued and in what capacities. As an alternative to dismissal pursuant to Rules 12(b)(1) and/or 12(b)(7), Plaintiffs should be ordered pursuant to Rule 12(e) to set forth a more definitive statement. Plaintiffs ambiguously describe the 2011 Elected Council as only "purported" council members, with no legal authority to represent the Tribe. SAC ¶¶ 23-27, 37. Likewise, Plaintiffs'

ambiguously designate the Tribe as a plaintiff but suggests it might be treated as a defendant, thereby arguably requiring the Tribe to appear since its Council was served. SAC ¶ 37. Tribal defendants have a right to know exactly who is being sued and in what capacity; the SAC fails to meet this basic requirement.

II. FACTUAL AND PROCEDURAL HISTORY

The Timbisha Shoshone Tribe. The Timbisha Shoshone Tribe is a sovereign nation. Since time immemorial, the Tribe has lived in portions of California and Nevada. The Tribe's ancestral homeland includes the area that now comprises the Panamint mountain range and other substantial areas of California and Nevada.

The Tribe achieved federal recognition in 1983 and exercises governmental authority over the Timbisha Shoshone Reservation. *See* Timbisha Shoshone Homeland Act, Pub.L. No. 106–423 § 2(2), 114 Stat. 1875 (2000). The Tribe's Constitution provides that the governing body of the Tribe is the General Council, which is composed of all tribal members sixteen years of age or older. Dkt. No. 1, Exh. A (Tribe Constitution, Article IV, Section 2); Judicial Notice Requested. The Tribe's Constitution further provides that, from the General Council, a Tribal Council composed of five people shall be elected and enumerates the powers delegated to the Tribal Council by the General Council. *Id*. (Article IV, Section 3; Article V, Section 1; and Article V, Section 2). Procedures for the election of the Tribal Council are set forth in the Tribe's Constitution, *id*. (Article VI), and its Election Ordinance. Dkt. No. 1, Exh. C (Election Ordinance); Judicial Notice Requested. A Tribal Election Board, appointed by the Tribal Council, is responsible for administering elections and for determining where polling will be conducted. Dkt. No. 1, Exh. A (Article VI, Section 1).

The Tribal Council is critical to the operations and welfare of the Tribe. The Council exercises most elements of day-to-day governmental authority on behalf of the Tribe, including the power to enact laws, engage in government-to-government transactions, spend Tribal funds, impose taxes, enter third-party contracts, and manage the natural resources of the Tribe. *Id.*

(Article V, Section 2); Gholson Decl., ¶ 24. Without Council power and recognition, the Tribe effectively comes to a stand-still, causing political instability, jeopardizing the use of federal funds, including for housing, welfare, and environmental purposes, undermining the legal authority of the Tribe to enter into contracts with third parties, exposing the Tribe to liability for past transactions, and otherwise disrupting the nation. *Id*.; Jackson Decl., ¶ 7. Inevitably, in the absence of an operating Council, Tribal members suffer.

Members of the current Tribal Council – defendants Margaret Cortez, Bill Eddy, Earl Frank, George Gholson, and Clyde Nichols – were duly elected and are recognized by both the U.S. government and the Tribe itself under the Tribe's Constitution and Election Ordinance. Dkt. No. 59, Exh. B (*July 29, 2011 Ltr. from Asst. Secretary, Indian Affairs, Echo Hawk*, affirming federal recognition of the duly elected 2011 Elected Council, *i.e*., the five Council Member named here as defendants); Dkt. No. 48, Exh. 4 (*Tribe's Final Report of Special Election* affirming the duly elected 2011 Tribal Council, also with attached *Certification of Election Results*); *see also* Dkt. No. 48, Exh. 3 (*June 26, 2011 Memo from BIA N. Cal. Agency Superintendent Troy Burdick* analyzing election procedure and concluding 2011 Tribal Council was appropriately elected in "accordance with Tribal law"); Judicial Notice Requested. George Gholson is the current Tribal Chairman for the 2011 Elected Council.

Leadership Dispute. Plaintiffs (the Kennedy Faction) are comprised of seven (7) individuals who are disgruntled with and challenge the status, power, and composition of the current members of the current Tribal Council (the 2011 Elected Council). At various times in the past, Plaintiffs are alleged to have held positions themselves as elected members of the Tribe Council. The impetus for this lawsuit is therefore driven by political ambitions to undermine and overthrow the 2011 Elected Council.

Since 2007, the Kennedy Faction has authored numerous attempts to intercede with Tribal operations and leadership. Including the present action, no less than five (5) lawsuits have been filed regarding the leadership of the Timbisha Shoshone Tribe. Coincident with these lawsuits, a series of administrative decisions and appeals, both within the Tribe and involving

DOI have been instigated.[2] On March 1, 2011, Assistant Secretary Echo Hawk issued a decision acknowledging the Council led by George Gholson for the limited purpose of conducting an election in compliance with Tribal law ("EHD I"). A central premise to challenging EHD I is Plaintiffs' claim that BIA illegally allowed recently disenrolled Tribal members to vote; however, the DOI has repeatedly and rightfully concluded that the Kennedy Faction's attempt to disenroll 74 members was not consistent with Tribal law.[3] SAC Exh. A at 10; *see also* Gholson Decl., ¶ 11-14; Jackson Decl. ¶ 11. On April 29, 2010, the Tribe members voted to elect the 2011 Elected Council. This election was dispositive, in compliance with the Tribal Constitution and Election Ordinance, and the results of the election were acknowledged by Echo Hawk on behalf of the U.S. government ("EHD II").[4] SAC Exh. B; Dkt. No. 48, Exh. 4; Dkt. No. 48, Exh. 3; Gholson Decl., ¶ 10-13; Jackson Decl., ¶¶ 11.

Litigation in This Proceeding. On April 13, 2011, Plaintiffs filed their original complaint in this suit. On April 26, 2011, Plaintiffs filed a motion for preliminary injunction three (3) days before the April 29, 2011 election of the 2011 Elected Council. The Court denied the preliminary injunction request and questioned whether the courts had subject matter jurisdiction over Plaintiff's complaint. Dkt. No. 38 at 10-11. Thereafter, federal defendants filed a motion to dismiss on the grounds identified by the Court in the order denying the preliminary injunction.

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[2] For brevity, the complete rendition of tribal disputes need not be repeated again because the Court is already familiar with this case, but also because this motion to dismiss does not depend on the merits of Plaintiffs underlying contentions. *Chemehuevi Indian Tribe v. California Bd. of Equalization*, 757 F.2d 1047, 1051 (9th Cir. 1985) ("*Chemehuevi*"), *rev'd on other grounds*, 474 U.S. 9 (1985) (sovereign immunity is a jurisdictional bar irrespective of merits of the claims); *see, infra,* Section IV.A.

[3] Attempts to disenroll a significant percentage of a tribe in the midst of an election dispute should be viewed with appropriate suspicion. The criterion for membership in the Tribe has not changed, and some of the Plaintiffs were personally involved with the decisions to enroll the members, decades ago, that they now seek to disenroll. Gholson Decl., ¶ 14.

[4] Furthermore, to the extent the SAC seeks to reverse or challenge past elections, these occurred in the past and are now moot. Gholson Decl., ¶ 10. Under Article III of the U.S. Constitution federal courts are limited to adjudicating only ongoing controversies.

Dkt. No. 40. Rather than respond to this motion to dismiss, Plaintiffs filed the FAC, Dkt. No. 45; federal Defendants then filed a second motion to dismiss, Dkt. No. 46; and on July 12, 2011, the Court granted this second request and dismissed the case. Dkt. No. 58. In doing so, the Court held that Plaintiffs had failed to join both the Tribe and the 2011 Elected Council and, *that in light of the sovereign immunity afforded both these entities, neither party can be joined*. *Id*.

Undeterred, Plaintiffs now attempt to join the Tribe as a Plaintiff and the 2011 Elected Council members as Defendants. The Kennedy Faction asks the Court to declare that the federal government's decision to recognize the 2011 Tribal Council violated a law and that the decision be remanded for reconsideration. SAC Prayer for Relief, ¶¶ 1-2. Plaintiffs claim this relief is purely procedural and avoids implicating interests of the Tribe and 2011 Elected Council. *See, e.g.*, SAC ¶ 36. Plaintiffs are wrong. Sovereign immunity still applies and the requested relief in fact would dramatically interfere with Tribal self-government, and create, yet again, the dangers of a hiatus in government-to-government Tribal recognition.

III. STANDARD OF REVIEW

A. Motions to Dismiss under F.R.C.P. 12(b)(1)

Jurisdiction is a threshold issue. In a motion to dismiss under Rules 12(b)(1) the plaintiff bears the burden of proving that the court has subject matter jurisdiction to decide the case. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). "A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *A-Z Int'l v. Phillips*, 323 F.3d 1141, 1145 (9th Cir. 2003) (citation and quotations omitted).

In resolving motions under Rules 12(b)(1) a court is not restricted to allegations in the complaint but may consider materials outside the pleadings, such as affidavits. *See Data Disc., Inc., v. Sys. Tech. Assocs., Inc.*, 557 F.2d 1280, 1289 (9th Cir. 1977). Thus, a challenge to jurisdiction under Rule 12(b)(1) "can be either facial, confining the inquiry to allegations in the complaint, or factual, permitting the court to look beyond the complaint." *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039-40 n.2 (9th Cir. 2003).

B. Motion to Dismiss under F.R.C.P. 12(b)(7)

Under Rule 12(b)(7), a complaint must be dismissed if it fails to join an indispensable party under Rule 19. Fed.R.Civ.P. 12(b)(7). The court must consider (1) whether a party is "necessary" under Rule 19(a) – that is, whether the court can accord " 'complete relief'… among existing parties" or "whether the absent party has a 'legally protected interest' in the subject of the suit" that will be impaired or impeded. *See Shermoen v. United States*, 982 F.2d 1312, 1317-18 (9th Cir. 1992) ("*Shermoen*"). The court must next determine (2) whether the necessary party can be joined, and, if it cannot be joined, (3) whether that party is indispensable such that in "equity and good conscience," the case must be dismissed. *Id*. This inquiry is "'a practical one and fact specific,' " and considers prejudice to the existing and absent parties. *Id*. at 1317 (quoting *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990) ("*Makah*"); Fed.R.Civ.P. 19(b). The Court's decision on whether joinder of the Tribal Defendants is required, and whether dismissal is warranted if they are not joined, will be reviewed for abuse of discretion. *EEOC v. Peabody Western Coal Co.*, 610 F.3d 1070, 1076 (9th Cir. 2010).

C. Motion for More Definite Statement under F.R.C.P. 12(e)

Rule 12(e) allows defendants to "move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response." "[T]he proper test in evaluating a motion under Rule 12(e) is whether the complaint provides the defendant with a sufficient basis to frame his responsive pleadings." *Federal Sav. and Loan Ins. Corp. v. Musacchio*, 695 F. Supp. 1053, 1060 (N.D. Cal. 1988). A Rule 12(e) motion also may be granted "where the complaint is so general that ambiguity arises in determining the nature of the claim or the parties against whom it is being made." *Sagan v. Apple Computer, Inc.*, 874 F. Supp. 1072, 1077 (C.D. Cal. 1994) ("*Sagan*").

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IV. LEGAL ARGUMENT

A. The Tribe's Sovereign Immunity is a Subject Matter Jurisdictional Bar to All Claims

It is hornbook law that sovereign immunity bars suits against Indian tribes unless a federal statute expressly and clearly waives this immunity, or a tribe agrees, clearly and expressly, to waive its immunity. *See, e.g., Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) (tribal sovereign immunity is a jurisdictional bar to suit); *United States v. Oregon*, 657 F.2d 1009, 1012-13 (9th Cir. 1981). Tribal sovereign immunity bars suits directly against tribes regardless of whether the activity complained of occurred on or off or the Tribe's reservation. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.,* 523 U.S. 751, 754-55 (1998). Moreover, sovereign immunity is a non-discretionary jurisdictional bar to any claims against an Indian tribe, "irrespective of the merits of the claim." *Chemehuevi,* 757 F.2d 1047, 1052 n.6; *see also Wendt v. Smith*, 273 F.Supp.2d 1078, 1082 (C.D. Cal. 2003). "Sovereign immunity involves a right which courts have no choice, in the absence of a waiver, but to recognize." *State of California v. Quechan Tribe of Indians*, 595 F.2d 1153, 1155 (9th Cir. 1979).

Supreme Court precedent clearly extends tribal immunity from suit to tribal government officials such as a tribal council. *Burlington Northern & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1090 (9th Cir. 2007) (holding suit against Tribal Chairman barred by sovereign immunity and noting that "Indian tribes, and tribal officials acting within the scope of their authority, are immune from lawsuits or court process in the absence of congressional abrogation or tribal waiver." (citations omitted); *Marceau v. Blackfeet Housing Authority*, 455 F.3d 974, 978 (9th Cir. 2006) (sovereign immunity extends to tribal officials acting in their official capacity and within the scope of their authority); *see also Timbisha Shoshone Tribe v. Bureau of Indian Affairs*, 2003 WL 25897083 at 3 (E.D. Cal.) ("*Timbisha 2003*") ("The tribal defendants – members of the Kennedy Council – are also immune from suit insofar as they are acting as the governing body of the tribe.").

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The Supreme Court has expressly rejected the application of equitable considerations in the context of tribal sovereign immunity. *See Three Affiliated Tribes v. Wold Eng'g*, 476 U.S. 877, 893 (1986) ("The perceived inequity of not allowing suit against an Indian tribe "simply must be accepted in view of the overriding federal and tribal interests in these circumstances."); s*ee also McClendon v. United States*, 885 F.2d 627 (9th Cir. 1989). Thus "the requirement that a waiver of tribal immunity be 'clear' and 'unequivocally expressed' is not a requirement that may be flexibly applied or even disregarded based on the parties or the specific facts involved." *Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1267 (10th Cir. 1998) (citing *Chemehuevi*, 757 F.2d at 1052 n.6).

The Tribe and 2011 Elected Council both enjoy sovereign immunity. Where, as here, a tribal government does not expressly waive its immunity, courts lack jurisdiction over the tribe regardless of the specific facts or merits involved in the lawsuit. There has been no congressional or tribal consent to waiver of immunity for this suit. Gholson Decl., ¶¶ 1, 5. Nothing regarding the status of these entities has changed since the FAC was dismissed. The Tribal Defendants continue to be protected as sovereign immune bodies and the entire suit must be dismissed for lack of subject matter jurisdiction. Fed.R.Civ.P. 12(b)(1).

No principled argument exists against dismissing this case on sovereign immunity grounds. First, Plaintiffs do not and cannot allege that there is a Tribal or federal waiver of immunity because no such waivers exist. *See* Dkt. 1, Exh. A (Timbisha Shoshone Tribe Constitution, Art. V, Sect. 1(c)(5) (only General Council has authority to waive the Tribe's immunity from suit)).

Second, Plaintiffs' attempt to have the Tribe designated as a plaintiff (rather than a defendant) is of no import to sovereign immunity. The Tribe vigorously opposes the Kennedy Faction's attempt to join the Tribe as a *plaintiff* with no legal authority. *See Timbisha 2003,* 2003 WL 25897083 at 3 (E.D. Cal. 2003) ("[I]n cases where more than one body asserts governing authority over a tribe, it is only the group recognized as the governing body by the Secretary which can sue… [the Tribal] Council has not authorized this suit, and without such

authorization, the Tribe is not a proper-party plaintiff") (citations omitted) (citing F. Cohen, Handbook of Federal Indian Law, 1982 ed.).[5] The Tribe now specially appears as a *defendant* to assert its sovereign immunity rights and ensure it is not misrepresented as a plaintiff. Gholson Decl., ¶ 4; *see also* SAC ¶ 37 (Plaintiffs acknowledge power of Court to treat the Tribe as a defendant).

Finally, Plaintiffs' hollow attempt to make a case by suing the 2011 Elected Council members while not acknowledging their authority to govern is nonsensical. On the one hand, the SAC alleges that the members of the Tribal Council are not legitimately elected and therefore do not enjoy sovereign immunity. SAC ¶¶ 31, 32 (members of the 2011 Elected Council "are not lawfully elected"), 34 ("the elected council is not federally recognized" and "there is no governing body of the Tribe that can competently assert or waive its sovereign immunity or otherwise respond to this action").[6] On the other hand, Plaintiffs claim they do not seek to terminate federal recognition of the 2011 Elected Council, stay the effectiveness of the Echo Hawk Decisions, or create the effect of a hiatus in federal recognition of a tribal government. SAC ¶ 36, Prayer for Relief. Plaintiffs' theory of the case is confusing. If the 2011 Elected Council is recognized by DOI for purposes of government-to-government relations, and if the

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[5] Unlike in *Timbisha 2003*, Plaintiffs here also fail to cite 28 U.S.C. § 1362 as the appropriate jurisdictional basis for engaging the Tribe as a plaintiff in tribal disputes.

[6] These allegations – that the 2011 Elected Council is without authority – should be stricken from the SAC as inconsistent with the complaint's attached exhibits. *See* Dkt. No. 59, Exh. B (federal recognition of 2011 Elected Council). "[W]hen a written instrument contradicts allegations in a complaint to which it is attached, the exhibit trumps the allegations." *Thompson v. Illinois Dept. of Prof. Reg.,* 300 F3d 750, 754 (7th Cir. 2002) (internal quotes omitted); *Sprewell v. Golden State Warriors*, 266 F3d 979, 988 (9th Cir. 2001). Plaintiffs have pleaded themselves into a quandary by attaching exhibits inconsistent with their claims.

Plaintiffs specifically state that this is not in dispute, then the 2011 Elected Council enjoys sovereign immunity and the suit must be dismissed under Rule 12(b)(1).[7]

The dismissal of this suit is mandated by the policy of tribal immunity. This is not a case where some procedural defect such as venue precludes litigation of the case. Rather, the dismissal turns on the fact that Indian tribes are shielded from suit without Congressional or tribal consent.

B. This Case Should Be Dismissed with *Prejudice* Because Under Rule 19 the Tribe and Its Council Are Necessary, Indispensable Parties That Cannot Be Joined

The Kennedy Faction implicitly acknowledges the necessity of the Tribal Defendants' participation in this case by having joined or named them in suit. The Court, moreover, has twice opined or held that the Plaintiffs failed to show that the action could proceed absent joinder of both the Tribe and the then-recognized Tribal Council. Dkt. No. 58; Dkt. No. 38. As before, without the Tribal Defendants properly joined, the SAC suffers the same defects and should be dismissed. Fed.R.Civ.P. 19.

To analyze whether dismissal is required under Rule 19, the court must determine (1) whether a party is necessary, next (2) whether the necessary party can be joined, and, if it cannot be joined, (3) whether that party is indispensable such that in "equity and good conscience," the case must be dismissed. *See, supra*, Section III.B.

1. The Tribe and 2011 Elected Council Are Necessary Parties

Absent parties are necessary under Rule 19(a) if any one of the following factors are met: (1) the parties "claim an interest relating to the subject of the action and [are] so situated that the disposition of the action in the [parties'] absence may ... as a practical matter impair or impede the [parties'] ability to protect that interest;" or (2) the court cannot, without the absent parties,

[7] If Plaintiffs argue that members of the 2011 Elected Council are sued only in their individual capacities, then this suit nonetheless must be dismissed for failure to join indispensable parties. *See, infra*, Section IV.B.

accord complete relief among the existing parties; or (3) an existing party is left subject to a substantial risk of incurring multiple or inconsistent obligations if the absent party is not joined. *See* Fed.R.Civ.P. 19(a). The Tribe and 2011 Elected Council are necessary parties if just *one* of these criteria are satisfied.

"Rule 19, by its plain language, does not require the absent party to actually *possess* an interest; it only requires the movant to show that the absent party *claims an interest* relating to the subject of the action." *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 998 (10th Cir. 2001) (citing *Shermoen,* 982 F.2d at 1318 and *Davis v. United States*, 192 F.3d 951 (10th Cir. 1999) (citations omitted). "Consequently, Rule 19 excludes only those *claimed* interests that are `patently frivolous." *Id*.

Here, both Tribal Defendants have legally protected interests in the outcome of this case. "[T]he Tribe has an interest in the outcome of the suit because at bottom, this case is an internal dispute between two tribal factions" that "raises questions about compliance with the Tribe's Constitution and Election Ordinance, questions in which the Tribe as a whole has a clear interest," and because "[t]he governance of the Tribe is at stake…, and the Tribe has an interest in any change in its governing body." *Timbisha 2003*, 2003 WL 25897083 at 5. The six claims for relief in the SAC are replete with issues and allegations related to internal tribal affairs, tribal laws, tribal governance, tribal membership, and federal common law. *See, e.g.*, SAC ¶¶ 132-142 (Second Claim – interference with Tribal affairs and failure to defer to interpretations of Tribal law), ¶¶ 143-154 (Third Claim – interference with Tribal membership decisions), ¶¶ 155-156 (Fourth Claim – interference with Tribal governance). Attacks on these political and internal tribal matters are of the utmost importance to the Tribal Defendants. Gholson Decl., ¶¶ 19, 20, 26.

The prayer for relief to declare EHD II unlawful and remand it for reconsideration, if granted, would be dramatically impact Tribal sovereignty and jeopardize the Tribe's ability to operate as a government. Gholson Decl., ¶¶ 21-23; *see* SAC Prayer for Relief, ¶¶ 1-2. No meaningful distinction exists in the SAC by removing the requested relief in the FAC to enjoin

DOI from implementing the Echo Hawk Decisions. *Id.*; *cf.* FAC Prayer for Relief. The heart of the matter remains the same: both complaints request a declaration that BIA's recognition of the 2011 Election Council was illegal and a remand of that decision.[8] *Id.* The result the Plaintiffs seek is still the same: to effectively set the clock back over a year, at the expense of the Tribe. Jackson Decl., ¶ 3.

The severe harms to the Tribe that this suit threatens are predictable and further detailed as follows:

- Interference with the Tribe's Right to Self-governance. If EHD I or II were declared illegal, the 2011 Elected Council would be immediately questioned as a legitimate government body and divested of significant power. Gholson Decl., ¶ 22; Jackson Decl., ¶ 5, 12. The Tribe also has a legal interest in preserving its right to determine its membership, which the Kennedy Faction attacks by challenging the Echo Hawk Decisions on the basis that BIA allegedly allowed non-Tribal members to vote. SAC ¶¶ 143-154 (third claim for relief). Plaintiffs thereby seek to deprive dozens of individuals of membership status in the Tribe. Gholson Decl., ¶ 14. Additionally, the Tribe has a legally protected interest in being able to continue with the political progress that has been made since last year's elections. For example, the Constitution Committee, in cooperation with the Tribal Council, has proposed numerous amendments to the Tribal Constitution that are critical to the self-governance and operations of the Tribe. Jackson Decl., ¶¶ 8-10.

- Interference with the Tribal Business. The Tribe's ability to conduct business will be chilled if not entirely halted by a declaration that EHD II was invalid. Gholson Decl., ¶¶ 21-24. No businesses will risk negotiating with a tribal council that has questionable authority. Any present, past, or future contracts signed by the 2011 Elected Council will be questioned and

[8] One nuance in the SAC is that Plaintiffs covertly demand that a hiatus be imposed at the outset of the case by denying the 2011 Elected Council recognition as a legitimate government body. SAC ¶¶ 30-32, 34. Thus, to avoid dismissal of the SAC, Plaintiffs would have the Court strip the 2011 Elected Council of power.

expose the Tribe to legal liability. *Id*. As but one example of a business exposure, the Tribe recently concluded an eight-month negotiation with a significant casino developer, and the parties' have executed a gaming development agreement, but this effort cannot be completed without a tribal council that is operational and stable. *Id*.

- Interference with Tribal Federal Programs and Funding. Every possibility exists that BIA will refuse to continue federal interactions with the 2011 Elected Council if its recognition is declared unlawful. Gholson Decl., ¶¶ 21, 22, 25; Jackson Decl., ¶ 7. Federal funding and programs, including those for environmental, housing, social welfare, and other critical matters for Tribal members, will be put at immediate risk. *Id*.
- Harm to the Tribal Council Members. Members of the 2011 Elected Council also have a legally protected interest in the outcome of this case. A legally protected interest may arise out of ownership, or a legal entitlement, to a share of a limited resource. *Makah*, 910 F.2d 558-60. As individual officials, the members of the 2011 Elected Council campaigned for and were elected to officer positions in the Tribe, which are, by definition, limited resources. At least one member of the Tribal Council is also being challenged as to his enrollment status, which raises another legally protected interest in Tribal membership. SAC ¶ 26.
- Expenses of Administrative Proceedings and Elections. If EHD II is remanded, the Tribe and 2011 Elected Council will be forced to engage in BIA's administrative proceedings to protect legal interests over Tribal membership and leadership. Jackson Decl., ¶ 13. If a new special election is ordered by BIA, the financial cost to the Tribe will be $25,000 - $30,000. *Id*.

Under Rule 19, in certain circumstances, this impairment of legal interests may be minimized if the absent party is adequately represented in the suit. *See Shermoen*, 982 F.2d at 1318. But those circumstances do not exist here. Tribal Defendants are necessary to add the perspective of the Tribe on the lawsuit's impacts to tribal interests, as well as to correctly interpret tribal laws, tribal membership, and tribal sovereignty. *See generally* Gholson Decl.; Jackson Decl. The United States defendants in this suit have neither the incentive nor necessary knowledge of tribal matters to represent these perspectives. *See, e.g., Pit River Home & Agr.*

Coop. Ass'n v. United States, 30 F.3d 1088, 1101 (9th Cir. 1994) ("*Pit River Home*") (in intertribal conflicts the United States is not an adequate representative of an absent tribe). Moreover, even were the federal defendants to vigorously contest the case in district court, they might decide not to appeal any unfavorable decision; but as a non-party, the Tribal Defendants would have no right to appeal, even if the federal defendants' decision was based on considerations other than the merits. Additionally, potential conflicts of interest exist if the United States government is unsatisfied with the 2011 Elected Council or were to receive a financial benefit by withholding tribal funds if EHD II were declared illegal and remanded.

Complete relief, moreover, cannot be granted without the Tribal Defendants, and the U.S. government, as the existing party, would be exposed to multiple or inconsistent obligations. *Confederated Tribes of the Cehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991) ("*Confederated Tribes*"). The 2011 Elected Council, not bound by any judgment, will *attempt* to retain recognition as the authority for government-to-government relations in direct contradiction to the requested remedy that the federal recognition (EHD II) of the current Council be declared illegal. SAC Prayer for Relief, ¶ 1. The U.S. government meanwhile will be torn by inconsistent obligations. Various U.S. government agencies, including BIA, are currently engaged and obligated to transact with the 2011 Elected Council; however, in the face of EHD II being overturned, BIA will have no legal basis to continue recognizing and transacting with the 2011 Elected Council. *See, e.g.*, Gholson Decl., ¶ 24 (Tribe is in the process of submitting a management agreement to the National Indian Gaming Commission for approval pursuant 25 U.S.C. 2710(d)(9)). No matter how BIA might respond to a successful challenge to EHD I or II, future lawsuits will be spawned by the federal government's inconsistent obligations.

2. Neither the Tribe Nor the Tribal Council Can Be Joined in Suit

Although the Tribe and Tribal Council are necessary parties under Rule 19(a), neither can be properly joined as a party because both entities enjoy Tribal sovereign immunity. *See, supra*,

Section IV.A. Since they cannot be joined, the Court must determine if these entities are indispensable to the lawsuit, considering the factors listed in Rule 19(b). Fed.R.Civ.P. 19(b).

3. The Tribe and 2011 Elected Council Are Indispensable Parties

The Tribe and the Tribal Council are indispensable parties if, "in equity and good conscience," the court should not allow the action to proceed in their absence. Fed.R.Civ.P. 19(b); *Kescoli v. Babbitt*, 101 F.3d 1304 (9th Cir. 1996) ("*Kescoli")*, 101 F.3d 1304, 1310 (9th Cir. 1996), citing *United States ex rel. Morongo Band of Mission Indians v. Rose*, 34 F.3d 901, 907 (9th Cir.1994). To make this determination, the courts balance four factors: (1) prejudice to any party or to the absent party; (2) whether relief can be shaped to lessen prejudice; (3) whether an adequate remedy, even if not complete, can be awarded without the absent party; and (4) whether there exists an alternative forum. *Kescoli*, 101 F.3d at 1310-1311 (citations omitted). "Because both [absent parties] have sovereign immunity, little balancing of these factors is required." *Timbisha 2003*, 2003 WL 25897083 at 5-6 (E.D. Cal.) (citing *Kescoli,* 101 F.3d at 1311 and *Confederated Tribes*, 928 F.2d at 1499 ("If the necessary party is immune from suit, there may be very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor.")).

As to the first factor, the Tribe and the Tribal Council have an interest in the outcome of the action, and that interest also includes prejudice if the action proceeds in their absence. *Kescoli*, 101 F.3d at 1311 (citing *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994) ("The prejudice to the [tribe] stems from the same legal interests that make the [tribe] a necessary party to the action.")). Also, "plaintiffs may not do indirectly what they cannot do directly. Plaintiffs cannot get relief from federal defendants that implicates the interests of parties with sovereign immunity."[9] *Timbisha 2003*, 2003 WL 25897083 at 6 (E.D. Cal.) (citing

[9] The courts have no jurisdiction to now intercede and second-guess the Tribes election *indirectly* by declaring BIA's recognition of the Tribe invalid. This case raises political questions. EHD II is merely the fruition of the Tribe's right to self-government, whereby BIA has recognized the (continued on next page)

Pit River Home, 30 F.3d at 1097-1103. The Kennedy Faction's effort to have the Court undermine BIA's recognition of the 2011 Elected Council certainly implicates and would prejudice the interests of the Tribal Defendants. Gholson Decl., ¶¶ 21, 22; Jackson Decl., ¶¶ 4-5.

As to the second factor, there is no way to shape the relief to lessen the prejudice, because *any* interference with the federal recognition of the 2011 Elected Council will have immediate and severe impacts on the Tribe, its sovereignty, and the members of the 2011 Elected Council. *See, supra*, Section IV.B.1 (discussion of harms to Tribe and its Council). The Tribal Defendants would need to intervene in this case to protect the lawful federal status of the 2011 Elected Council from being challenged and sent back to BIA for reconsideration. *Kescoli*, 101 F.3d at 1311 (prejudice is not lessened if the absent parties are required to waive their immunity and intervene in the action to protect their interests).

As to the third and fourth factors, the Kennedy Faction has an alternative forum and remedy: they can run again for office during the next official Tribal election. Gholson Decl., ¶ 27; Jackson Decl., ¶ 14. Plaintiffs may not like this remedy (considering they were soundly defeated in the April 29, 2011 election now being challenged) but it does provide the appropriate forum to pursue their political ambitions. Regardless, even if an alternative forum were not available, the courts have held that a tribe's interest in maintaining its sovereign immunity outweighs a plaintiff's interest in litigating a claim. *American Greyhound Racing, Inc., v. Hull,* 305 F.3d 1015, 1025 (9th Cir. 2002) ("[W]e have regularly held that the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs."); *see also Kescoli*, 101 F.3d at 1311 (Tribe's sovereign immunity is a compelling factor favoring dismissal); *Village of Hotvela Traditional Elders v. Indian Health Services*, 1 F.Supp.2d 1022, 1031 (D.Az. 1997)

(footnote continued from previous page)
2011 Elected Council as duly elected in accordance with Tribal compliance with the Tribe's Constitution, Election Ordinance and Membership Ordinance.

Because both the Tribe and 2011 Elected Council are necessary and indispensable parties, this lawsuit cannot continue it their absence and must be dismissed.

C. In the Alternative, Plaintiffs Should Be Required to Provide a Definite Statement as to the Nature of Parties and Claims

The Court should dismiss this suit. However, as an alternative to dismissal pursuant to Rules 12(b)(1) and (7), Tribal Defendants request that Plaintiff be ordered to set forth in greater detail the nature of the claims and the parties against whom the complaint is filed. Fed.R.Civ.P. 12(e). Rule 12(e) allows defendants to "move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response." A Rule 12(e) motion may be granted where the complaint gives rise to ambiguity in determining "the nature of the claim or the parties against whom it is being made." *Sagan*, 874 F. Supp. at 1077.

The theory of Plaintiffs' case appears intentionally ambiguous and contains unresolved contradictions. The members of the 2011 Elected Counsel are named as defendants but allegedly without any official powers or sovereign immunity, raising ambiguity over whether they are sued in their official or individual capacities. SAC ¶¶ 23-32. Similarly, the Tribe is ambiguously named as a plaintiff that *might* be treated as a defendant. SAC ¶¶ 36-37. Plaintiffs' requested relief, moreover, is unintelligible because the prayer alleges to avoid impacting Tribal authority and official recognition but the entire complaint is premised on Plaintiffs' demand that the Court treat the 2011 Elected Council as having *no* Tribal recognition or authority. SAC ¶¶ 34, 36, 48; Prayer for Relief ¶¶ 1-2.

Additionally, the service of summons of the SAC on the 2011 Elected Council members is defective because the proof of service does not indicate the method of service or whether Plaintiffs also attempted to serve defendants in their individual capacity. Declaration of James Birkelund attached as Exh. C, ¶ 2-3 (proof of service attached); *Matthews Metals Prods., Inc. v. RBM Precision Metal Prods., Inc.*, 186 FRD 581, 582 (N.D. Ca. 1999) (when defendants are sued in their official and individual capacities, the summons should reflect the dual capacities in

which defendants are named in the action); Cal. E.D. Local Rule 210 ("Such proof of service shall show the date, place, and manner of the service."). Personal jurisdiction under Rule 12(b)(2) therefore does not exist over any Tribal Defendant in their individual capacities. Fed.R.Civ.P. 12(b)(2).

These ambiguities render it unreasonably difficult for Tribal Defendants to respond to the complaint. If this case is not presently dismissed, Tribal Defendants request that Plaintiffs be required to provide a more definite statement regarding the status of each defendant (whether sued in official or individual capacities and whether as plaintiffs or defendants) and the nature of the relief requested against the Tribe and its Council (explaining how and why a hiatus of Tribal recognition is not precondition to this suit).

V. Defendants Are Entitled to Costs for Preparing and Specially Appearing for this Motion to Dismiss

In any action or suit dismissed "for want of jurisdiction," the court may order "payment of just costs." 28 USC § 1919. Plaintiffs' SAC fails for want of subject matter jurisdiction, and accordingly, Defendants request that the Court award to Defendants all of their costs, and any other relief or fees as may be appropriate, related to filing and arguing this motion to dismiss.

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VI. CONCLUSION

Plaintiffs in their Second Amended Complaint offer no legitimate basis for the Court to reconsider its earlier ruling dismissing this lawsuit. Accordingly, Tribal Defendants request that the Court dismiss this case in its entirety with prejudice.

Dated: August 3, 2012

Respectfully submitted,

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